No. 126, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

NEBRASKA'S SUR-REPLY ON EXCEPTIONS TO PLAINTIFF'S RESPONSE

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INTRODUCTION

Kansas wrongly portrays Nebraska as a "serial" violator whose recalcitrance demands relief this Court has never before granted. Kansas Reply at 28. Nebraska is not a serial violator. Nebraska violated the Republican River Compact ("Compact") once and has since overhauled its water management activities to ensure no further violations occur. Report of the Special Master ("Final Report") at 116-22. Kansas is living in the past. As Special Master Kayatta correctly concluded, the past does not foretell the future of the Republican River Basin. *Id. See also id.* at 182-83. It is time Kansas receive reasonable compensation and the States move on.

The States cannot do so, however, until the Republican River Compact Administration's ("RRCA") Accounting Procedures are fixed to prevent Nebraska from being charged with the consumption of imported water. The current procedures conflict with the express terms of Section IV.F. of the Final Settlement Stipulation, December 15, 2002 ("FSS"). Kansas complains about the progression of Nebraska's counterclaim. But, since Kansas has affirmatively waived its right to seek "additional proceedings or a remand[,]" the Court should adopt the Special Master's recommended changes to the RRCA Accounting Procedures. *See* Final Report, § VI.A.

ARGUMENT

I. KANSAS SHOULD RECOVER ONLY ITS ACTUAL DAMAGES.

The only issue remaining from 2006 is the proper quantification of Kansas' damages. Kansas should recover no more than its actual damages, which the Special Master quantified roughly at $3.7 million. *Id.* at 170-72. Given the Special Master's findings, Kansas cannot justify an award that exceeds a monetary approximation of the harm it actually suffered as a result of Nebraska's overuse. Instead, Kansas miscasts Nebraska as a repeat offender, and suggests Nebraska's cumulative disregard for the Compact somehow justifies disgorgement in this case. As discussed below, this is a fiction on which Kansas could not capitalize even if it were true. Kansas' alternative justifications – to incentivize compliance and to make up for its "vulnerability" – also fail to persuade.

A. Nebraska is not liable for historic pumping impacts dating to the 1950s.

When Kansas sued Nebraska in 1998, the States had a good faith dispute about the propriety of including the impact of groundwater pumping in Compact accounting. *See, e.g.*, Answer and Counterclaim of the State of Nebraska, April 16, 1999, ¶¶ 5-10; Motion to Dismiss and Brief in Support of Motion to Dismiss, August 2, 1999. While Kansas argued the impact of all such pumping should be included, Nebraska maintained it should not. First Report of the Special

Master (McKusick) (Subject: Nebraska's Motion to Dismiss), January 28, 2000 at 16-18. Indeed, the official Compact accounting did not include the impact of groundwater pumping attributable to non-alluvial wells.[1] *Id.* at 16-17.

Ultimately, Special Master McKusick concluded Nebraska's alluvial and non-alluvial pumping should be included in the Compact accounting. *Id.* In the wake of that decision, the States entered their settlement discussions, which ultimately led to the FSS. No order of this Court, indeed not even so much as a "*report,*" previously concluded Nebraska had violated the Compact. Kansas Reply Brief at 44 (characterizing Special Master Littleworth's work in *Kansas v. Colorado*) (emphasis original).

Unable to point to an actual violation of the Compact, Kansas relies on hypothetical violations that might have occurred had the *current* RRCA Accounting Procedures, adopted in 2002 as part of the FSS, been in place as far back as 1959. Kansas Reply at 6-8 and App. B. *See also source* K24 (KS728) (explaining the results depicted in App. B show what would have occurred "had the current compliance standards been in effect then"). Because this particular analysis was so misleading and entirely hypothetical, Nebraska never bothered to respond to its technical merit, or,

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[1] For this reason, Kansas' so-called "formal notices and warnings" in the early 1990s were of no moment. Kansas Reply at 6-7.

more specifically, its lack thereof. Nor did the Special Master inquire further about it.[2]

Kansas ignores Special Master McKusick's ruling that the parties are forever bound by Compact accountings they unanimously approved prior to 1998. Special Master's Memorandum of Decision No. 1 (Subject: Three Issues for Early Resolution), February 12, 2011 at 2-11. More importantly, Kansas ignores the effect of FSS § I.C., which provides:

> the States agree that all claims against each other relating to the use of the waters of the Basin pursuant to the Compact with respect to activities or conditions occurring before December 15, 2002, shall be waived, forever barred and dismissed with prejudice. These claims shall include all claims for Compact violations, damages, and all claims asserted or which could have been asserted in the pending proceeding, No. 126, Original.

See also Kansas Reply at 7 ("In agreeing to the FSS in 2002, Kansas made a significant concession when it waived the Compact violation claims it brought for these years."). Thus, even if Kansas' hypothetical violations had materialized, Kansas affirmatively waived any claims against Nebraska for those violations. Kansas may not indirectly resurrect its claims

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[2] It is entirely unclear how Kansas arrived at these figures, but it is clear the analysis fails to adjust for Special Master Kayatta's recommended changes to the RRCA Accounting Procedures to avoid the improper consumption of imported water.

under the guise of justifying a heightened damage award for a single violation occurring in 2006.

B. Nebraska has properly responded to the 2006 violation.

Nebraska never denied the fact it consumed more water than it was entitled to consume in 2006. Immediately after being accused, Nebraska responded in an effort to resolve the dispute and expressed a willingness to compensate Kansas. J3, JT002291 – 002303; *see also* N4000 ¶¶ 36-40. Nebraska maintained it could not be held liable for more than the average overuse occurring in the two-year period 2005-2006, principally because Appendix B of the FSS specifically states 2006 will be the first year in which Water-Short Year Administration may apply. However, in an effort to streamline this dispute, Nebraska has conceded the Special Master's conclusion that Nebraska is liable for the whole of its overuse from 2005-2006. Final Report at 85-95. Nebraska is not recalcitrant. Nebraska remains, as always, willing to make amends for its misstep by compensating Kansas for harm suffered.

Kansas criticizes Nebraska for not doing more to reduce its annual Computed Beneficial Consumptive Use ("CBCU") immediately following signing of the FSS. Kansas Reply at 11-19. As Kansas acknowledges, however, the "tests for Compact compliance that the States agreed to in the FSS are based on multi-year averages." Kansas Reply at 10. The legal significance

of multi-year averaging in the FSS is profound. As a result of multi-year averaging, Nebraska is entitled to rely on conditions (both reductions in CBCU or increases in Allocations) in future years to offset individual, annual overages – including those from 2002 through 2005. Thus, the fact that Nebraska used more than its *annual* allocation in 2002, 2003, 2004 or even 2005 is of no independent legal effect.[3] To indirectly punish Nebraska for annual overages from 2002-2005 is to ignore a foundational element of the FSS itself. Second Report of the Special Master [McKusick] (Subject: Final Settlement Stipulation), April 15, 2003 at 45-52.

Kansas correctly asserts Nebraska knew it could not maintain the *status quo* in 2006 and comply with the Compact; which is why Nebraska did not maintain the *status quo*. To the contrary, Nebraska undertook a series of extraordinary management actions, all consistent with the FSS, to reduce its CBCU. Final Report at 111. *See also* N4000 ¶¶ 16-20, 25-26, 28-29. It was, unfortunately, too little too late, and Nebraska remains ready to pay for losses Kansas suffered.

A large disgorgement award is particularly inappropriate here because Nebraska "has in place what it needs to comply with the Compact" and Kansas failed to show any threat of future non-compliance. Final Report at 116. In fact, Nebraska's Compact

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[3] In fact, Nebraska reduced its CBCU by roughly 60,000 acre-feet from 2000 through 2006. Kansas Reply, App. B.

compliance efforts since 2006 have resulted in Nebraska providing Kansas with over 300,000 acre-feet of water beyond the amount to which Kansas was entitled from 2007 through 2011. N4000 ¶ 34. This windfall is *four times* the amount of overuse in 2006 for which Special Master Kayatta found Nebraska to be liable (70,869 acre-feet). Final Report at 116.

C. Disgorgement is not necessary to incentivize future compliance.

Kansas demands the Court punish Nebraska so it will comply with the Compact in the future. But, as the Special Master correctly concluded, there is no threat of future non-compliance. Final Report at 116-27.[4] Nebraska is not asking the Court "simply to trust Nebraska to start meeting its Compact obligations. " Kansas Reply at 28. Nebraska simply seeks affirmation of the Special Master's ultimate conclusion – after three years of trial and mountains of evidence – that Nebraska's Integrated Management Plans are sufficiently robust to prevent a finding that

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[4] Notably, the United States, whose current and former Bureau of Reclamation employees (Swanda and Thompson) testified before Special Master Kayatta against Nebraska, apparently now concedes Nebraska's compliance plans are adequate to avoid future violations. *See, e.g.*, Brief of the United States as Amicus Curiae in Support of Overruling the Parties' Exceptions to the Report of the Special Master at 17 ("At the same time, the Master's conclusion that full disgorgement is unwarranted in light of evidence showing that Nebraska has positioned itself to ensure compliance going forward is also well supported.").

Nebraska is likely to violate the Compact in the future.

D. Disgorgement is not a cure for a lack of evidence.

Alternatively, Kansas asks the Court to award disgorgement because it is "vulnerable" given the difficulties it faces in proving actual damages. Kansas Reply at 36, 38. Trial on this issue would not even have been necessary had Kansas simply been willing to limit its demands to actual damages and foregone its quest to line its litigation coffers and fund statewide projects. *See* N9627. Ultimately, the difficulty experienced by the Special Master was not a challenge inherent in the task of proving actual damages; it resulted from an abject failure of proof. The Special Master made clear Kansas' claims were "over-stated" and forced him to rely on Nebraska's counterevidence to "infer" the amount of damage Kansas might have suffered. Final Report at 166. Disgorgement is not a substitute for Kansas' failure to quantify reliably its actual damages.

II. THE RRCA ACCOUNTING PROCEDURES ARE DUE TO BE CONFORMED TO THE PLAIN LANGUAGE OF THE FSS.

Nebraska understood the scope of reply briefs to be limited to issues raised in the Parties' Exceptions. Kansas' Reply contains gratuitous arguments in the guise of responsive "facts" that Nebraska briefly

addresses below. Kansas Reply at 19-28. Notably, nowhere has Kansas *ever* denied the fact that the RRCA Accounting Procedures charge Nebraska for the consumption of imported water supplies. The "facts" Kansas discusses are simply directed at process and the implication of prejudice. They do not bear out.

A. Nebraska did not seek to conform the RRCA Accounting Procedures as a means to reduce its liability.

Kansas asserts Nebraska engaged in a series of "maneuvers over the years as it sought to relax its compliance burden by rewriting the formulas used for the Compact accounting." Kansas Reply at 21; *see also id.* at 48. As to the parties' respective "maneuvers[,]" Nebraska simply refers the Court to Appendix G of the Special Master's Final Report. However, to be clear, Nebraska raised its concerns about the RRCA Accounting Procedures to the RRCA in June 2007, seven months prior to Kansas' first allegation against Nebraska. Kansas Reply at 22; J3, JT002217-8. Nebraska's effort to ensure the Accounting Procedures implement the plain language of the FSS obviously was not a response to Kansas' subsequent claims, which were first asserted in December 2007. J3, JT002485-7.

B. Kansas has not been prejudiced by pursuit of the "5-Run Solution."

Kansas argues "[t]he 5-Run Proposal was not submitted to the RRCA as required by the FSS[,]" Kansas Reply at 22, then proceeds to imply it was prejudiced by Nebraska's and Colorado's ultimate decision to prosecute the 5-Run Solution. As a preliminary matter, the 5-Run Solution was not submitted to Arbitration because Kansas already had rejected it, leading Nebraska to chase a wild goose. Final Report, App. G1-4.

Regardless, the problem presented by the RRCA Accounting Procedures has never changed. Nebraska always has asserted the procedures improperly charge Nebraska for the consumption of imported water. J3, JT002217-8. The solution (i.e., the remedy) Nebraska and Colorado sought changed as the case evolved because Nebraska successfully convinced Colorado of the technical merit of the 5-Run Solution it originally proposed in 2007 before Nebraska was sidetracked by Kansas' "Virgin Water Supply Metric." *See* Final Report, App. G1-3. The evolution of specific remedies intended to address properly framed controversies is commonplace in the course of litigation. For instance, Kansas has altered its requested injunctive relief at least three times since it initiated this action. *See* J7, JT003221 (seeking a shutdown of 515,000 irrigated acres in the Arbitration); K24, KS00757 (requesting a shutdown of 302,000 irrigated acres before Special Master Kayatta); Kansas Reply at 19 ("Kansas does not seek to dictate what specific actions Nebraska should take to avoid violating the Compact and the FSS.").

Moreover, the so-called "secret" deal between Colorado and Nebraska to pursue the 5-Run Solution was confidential for one month. Thereafter, Kansas was afforded four months prior to the August 2012 trial to prepare additional expert reports and testimony to address issues related to the 5-Run Solution, which Kansas admits it possessed since the summer of 2007. Final Report, App. G4-5; Kansas Reply at 22. At trial, Kansas successfully convinced the Special Master it needed even more time to address the 5-Run Solution. Ultimately, Kansas was given *an additional year* in which to develop its trial presentation, which culminated in an August 2013 supplemental trial solely for Kansas' benefit. *Id.*, G6-9. In the end, the effort proved to be a ruse. Kansas failed even to address the matters it told the Special Master and the parties it would pursue given the additional time. *Id.*, G8-9. Nebraska maintains these bizarre events further militate against any disgorgement award that might otherwise be ordered. *See* Nebraska's Exceptions and Brief in Support at 16.

Kansas ultimately concludes its "factual" discussion with the following waiver: "Kansas is not now asking for any additional proceedings or a remand to the Master to remedy the unfairness of the secret agreement and its last-minute revelation created." Kansas Reply at 28. In light of Kansas' waiver, the entire discussion is irrelevant.

CONCLUSION

For the reasons discussed in the briefing to date, Court should:

1) Overrule the Special Master's recommendation that Kansas be awarded $1.8 million over and above its actual damages, along with the finding that Nebraska "knowingly" violated the Compact;

2) Affirm the Special Master's recommendation that the Court deny all other forms of relief sought by Kansas; and

3) Affirm the Special Master's recommendation that the RRCA Accounting Procedures be reformed to conform to the express language of FSS § IV.F.

Respectfully submitted,

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